

SUKHVINDER SINGH NALDIP SINGH

A

v.

PP & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA

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ABDUL MALIK ISHAK JCA

AZAHAR MOHAMED JCA

BALIA YUSOF WAHI JCA

[CRIMINAL APPEALS NO: N-05-197-07-2011

C

& N-05-198-07-2011]

23 OCTOBER 2013

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Circumstantial evidence - Whether victim kidnapped and murdered - Whether totality of evidence irresistibly pointing to guilt of first appellant - Whether appeal dismissed*

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CRIMINAL PROCEDURE: *Kidnapping - Kidnapping Act 1961, s. 3 - Conviction and sentence - Appeal against - Victim kidnapped and murdered - Whether kidnapping staged by victim himself - Whether victim under confinement or restraint - Whether conviction safe - Whether appeal allowed*

E

EVIDENCE: *Adverse inference - Murder - Failure to call witness - Whether presumption arose against prosecution - Whether prosecution's discretion in calling of witnesses - Whether presumption arise only for failure to call material witness - Evidence Act 1950, s. 114(g)*

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The first appellant was charged under s. 302 of the Penal Code for the murder of one Gurumardev Singh ('deceased'). The first appellant was also charged together with the second appellant under s. 3 of the Kidnapping Act 1961 for the offence of having kidnapped the deceased. The deceased's father ('SP7') had received phone calls from an unknown person stating that the deceased had been kidnapped and a ransom was demanded. SP7 was instructed to board a train with the ransom money. As the train left the Seremban railway station, a phone call came telling SP7 to throw the money. At that point of time, SP7 saw the first appellant standing on a bridge holding a hand phone and talking. SP7 then threw the money onto the ground next to the railway track. The deceased was subsequently found dead and the first

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A and second appellants were arrested. The chemist report ('exh. P35') revealed that the clothes worn by the first appellant at the time of his arrest had traces of the deceased's blood on them. In the course of his investigation, SP6, the investigating officer was led to a place where the first appellant had pointed

B the area where the first appellant had thrown a parang. The said parang was found under some bushes and exh. P35 revealed the existence of a DNA profile consistent with the deceased's blood sample. The autopsy indicated that the cause of death was multiple slash wounds. Both the accused persons however, denied

C abducting the deceased. They claimed that the kidnapping was staged by the deceased himself in order to get money from his family. A CCTV recording ('exh. P58') showed the appellants and the deceased casually going in and out of a hotel with no indication at all that the deceased was under any kind of

D confinement or restrain. SD4 (the receptionist at the hotel) testified that the deceased did not appear to be under any threat or was in any way being forced. SD2 (the owner of a restaurant) testified to seeing the appellants and the deceased drinking beer and laughing together. The Judicial Commissioner ('JC') found the

E first appellant guilty and he was convicted on both the charges of kidnapping and murder and was accordingly sentenced to death, while the second appellant was convicted on the charge of kidnapping and was also sentenced to death. The appellants appealed against the convictions and sentences, *inter alia*, on the

F following grounds: (i) that the learned trial judge ('the judge') had not appreciated the evidence in exh. P58 and the evidence of SD2 and SD4; (ii) that there had not been any unlawful confinement of the deceased; (iii) that the blood sample of the first appellant referred to in exh. P35 was labelled Sukh Bundar Singh whereas

G the first appellant's name was Sukhvinder Singh. The person who took the blood sample, one Dr Norita, and the chemist were not called as witnesses, for which it was contended that an adverse presumption under s. 114(g) of the Evidence Act 1950 ('s. 114(g)') ought to have been invoked; (iv) that there was no

H direct evidence to implicate the first appellant on the death of the deceased; and (v) that the act of the first appellant pointing to SP6 the place where the parang was found was insufficient to implicate him.

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Held (allowing appellants' appeal on kidnapping charge; dismissing first appellant's appeal on murder charge) A
Per Balia Yusof Wahi JCA delivering the judgment of the court:

- (1) The non-calling of Dr Norita and the chemist did not affect the prosecution's case. The chemist report was properly admitted by the court and a copy of it had earlier been served on the appellants. Section 399 of the Criminal Procedure Code had been complied with. The blood sample, although labelled as Sukh Bundar Singh, was that of the first appellant. (para 51) B C
- (2) The duty of the prosecution is to prove its case against the accused person beyond reasonable doubt. The prosecution has a discretion whom to call and whether or not they should be called. It is trite that only the failure to call material witnesses will attract the application of s. 114(g). It is not just a failure to call any witness. The drawing of an adverse inference under s. 114(g) is not an inflexible rule, but depends on the circumstances of each particular case. On the facts, the non-calling of the chemist and Dr Norita could not attract the adverse presumption. (paras 52 & 53) D E
- (3) From exh. P58, there were no indications of any restraint or confinement. The trio seen in the recording were moving in and out of the hotel freely and casually. The evidence adduced by the prosecution failed to prove that there was wrongful restraint on the deceased. Thus, the appeal against the conviction and sentence under s. 3 of the Kidnapping Act 1961 was allowed and the first and second appellants were acquitted and discharged. (paras 54, 58, 61 & 70) F G
- (4) The JC had evaluated all the circumstantial evidence in its entirety and had considered the matter on the factual matrix of the case. The totality of the evidence proffered by the prosecution irresistibly pointed to only one conclusion and that was the first appellant was responsible for the death of the deceased, and him alone. There was nothing in the evidence to indicate that the second appellant was involved in the murder of the deceased or to have caused any restraint or injury to the deceased. (paras 69 & 85) H I

A *Bahasa Malaysia Translation Of Headnotes*

- Perayu pertama telah dituduh di bawah s. 302 Kanun Keseksaan bagi pembunuhan Gurumardev Singh ('si mati'). Perayu pertama juga telah dituduh bersama dengan perayu kedua di bawah s. 3
- B** Akta Penculikan 1961 bagi kesalahan menculik si mati. Bapa si mati ('SP7') telah menerima beberapa panggilan melalui telefon daripada seseorang yang tidak dikenali menyatakan bahawa si mati telah diculik dan wang tebusan dituntut. SP7 telah diarahkan untuk menaiki keretapi dengan wang tebusan tersebut. Apabila
- C** keretapi meninggalkan stesyen keretapi Seremban, SP7 menerima panggilan memberitahunya untuk mencampakkan wang tersebut. Pada waktu itu, SP7 melihat perayu pertama berdiri di atas sebuah jambatan dan sedang bercakap melalui telefon bimbit. SP7 mencampakkan wang tersebut ke atas tanah di tepi landasan
- D** keretapi. Si mati kemudiannya ditemui sudah meninggal dunia dan perayu pertama dan kedua telah ditangkap. Laporan kimia ('eks. P35') menunjukkan bahawa pakaian yang dipakai oleh perayu pertama pada masa dia ditangkap mempunyai kesan darah si mati. Semasa siasatan, SP6, pegawai penyiasat, telah dibawa ke
- E** suatu kawasan di mana perayu pertama telah menunjukkan kepadanya tempat di mana perayu pertama telah membuang sebilah parang. Parang tersebut dijumpai di bawah semak dan eks. P35 menunjukkan terdapat DNA profil yang konsisten dengan sampel darah si mati. Bedah siasat menunjukkan bahawa punca kematian
- F** si mati adalah kesan tetakan berbilang. Kedua-dua perayu, walau bagaimanapun, menafikan telah menculik si mati. Mereka mendakwa bahawa penculikan tersebut telah dirancang oleh si mati sendiri supaya dapat memperolehi wang daripada keluarganya. Satu rakaman CCTV ('eks. P58') menunjukkan bahawa perayu-perayu
- G** dan si mati keluar masuk sebuah hotel tanpa indikasi bahawa si mati dikurung atau dihalang. SD4 (penyambut tetamu di hotel itu) memberi keterangan bahawa si mati tidak kelihatan seperti berada dalam keadaan terancam atau dipaksa. SD2 (pemilik sebuah restoran) memberi keterangan bahawa dia melihat perayu-perayu
- H** dan si mati meminum air minuman keras dan gelak ketawa bersama. Pesuruhjaya Kehakiman ('PK') mendapati perayu pertama bersalah dan telah menyabitkannya atas kedua-dua pertuduhan penculikan dan pembunuhan dan telah menjatuhkan hukuman mati terhadapnya, manakala perayu kedua disabitkan dengan pertuduhan
- I** penculikan dan juga telah dihukum mati. Kedua-dua perayu merayu

terhadap sabitan dan hukuman, antara lain, atas alasan-alasan (i) bahawa yang arif hakim ('hakim') tidak menilai keterangan eks. P58 dan keterangan SD2 dan SD4; (ii) bahawa tiada pengurungan menyalahi undang-undang yang melibatkan si mati; (iii) bahawa sampel darah perayu pertama yang dirujuk dalam eks. P35 telah dilabelkan Sukh Bundar Singh padahal nama perayu adalah Sukhvinder Singh. Orang yang mengambil sampel darah, Dr Norita, dan ahli kimia tidak dipanggil sebagai saksi, yang mana diujahkan bahawa anggapan bertentangan di bawah s. 114(g) Akta Keterangan 1950 adalah berbangkit; (iv) bahawa tiada keterangan langsung untuk mengaitkan perayu pertama dengan kematian si mati; dan (v) bahawa tindakan perayu pertama menunjukkan kepada SP6 di mana parang ditemui adalah tidak memadai untuk membabitkannya.

Diputuskan (membenarkan rayuan perayu-perayu terhadap pertuduhan penculikan; menolak rayuan perayu pertama terhadap pertuduhan membunuh)

Oleh Balia Yusof Wahi HMR menyampaikan penghakiman mahkamah:

- (1) Kegagalan memanggil Dr Norita dan ahli kimia tidak menjejaskan kes pihak pendakwaan. Laporan kimia telah diterimamasuk dengan betul oleh mahkamah dan salinannya telah diserahkan kepada perayu-perayu. Seksyen 399 Kanun Tatacara Jenayah telah dipatuhi. Sampel darah, walaupun telah dilabelkan dengan nama Sukh Bundar Singh, terbukti adalah kepunyaan perayu pertama.
- (2) Kewajipan pihak pendakwaan adalah untuk membuktikan kesnya terhadap tertuduh melampaui keraguan munasabah. Pihak pendakwaan mempunyai budi bicara berkaitan siapa yang hendak dipanggil dan sama ada mereka harus dipanggil atau tidak. Adalah undang-undang mantap bahawa hanya kegagalan untuk memanggil saksi-saksi penting akan menarik penggunaan s. 114(g). Ia bukan kegagalan memanggil mana-mana saksi semata-mata. Penarikan inferens bertentangan di bawah s. 114(g) bukan peraturan yang tidak fleksibel, tetapi bergantung kepada keadaan setiap kes. Berdasarkan fakta, kegagalan memanggil ahli kimia dan Dr Norita tidak dapat menarik anggapan bertentangan.

- A (3) Daripada eks. P58, tiada indikasi bahawa wujud apa-apa penahanan atau pengurungan. Ketiga-tiga orang yang terlibat dilihat dalam rakaman keluar masuk hotel secara bebas dan bersahaja. Keterangan yang dikemukakan oleh pihak pendakwaan gagal membuktikan bahawa terdapat penahanan si mati secara salah. Oleh itu, rayuan terhadap sabitan dan hukuman di bawah s. 3 Akta Penculikan 1961 dibenarkan dan perayu pertama dan perayu kedua telah dilepaskan dan dibebaskan.
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- C (4) PK telah menilai kesemua keterangan ikut keadaan secara menyeluruh dan telah mempertimbangkan perkara tersebut atas matriks fakta kes. Keseluruhan keterangan yang telah diberikan oleh pihak pendakwaan membawa kepada satu kesimpulan sahaja iaitu perayu pertama bertanggungjawab terhadap kematian si mati, dan hanya dia seorang sahaja yang telah melakukan kesalahan itu. Tiada apa dalam keterangan yang menunjukkan bahawa perayu kedua terlibat dalam pembunuhan si mati atau telah menyebabkan apa-apa penahanan atau kecederaan kepada si mati.
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Case(s) referred to:*Abu Bakar v. Regina* [1963] 1 LNS 4 HC (*refd*)*Adel Muhammed el Dabbah v. AG of Palestine* [1944] AC 156 (*refd*)*Amathevelli P Ramasamy v. PP* [2009] 3 CLJ 109 FC (*fol*)*Ashmore v. Corporation of Lloyd's* [1992] 2 All ER 486 (*refd*)

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Chan Chwen Kong v. PP [1962] 1 LNS 22 CA (*refd*)*Chang Kim Siong v. PP* [1967] 1 LNS 18 FC (*refd*)*Chian Swee Ong v. PP* [2010] 3 CLJ 799 CA (*refd*)*Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC (*refd*)

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Gambhir v. State of Maharashtra AIR 1982 SC 1157 (*refd*)*Goh Ah Yew v. PP* [1948] 1 LNS 13 HC (*refd*)*Hanumant Govind Nargundkar and another Appellant v. State of Madhya Pradesh* AIR 1952 SC 343 (*refd*)*Jayaraman & Ors v. PP* [1981] 1 LNS 129 FC (*refd*)*Karam Singh v. PP* [1967] 1 LNS 65 FC (*refd*)

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Kishore Chand v. State of Himachal Pradesh AIR 1990 SC 2140 (*refd*)*Mumusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC (*refd*)*PP v. Hanif Basree Abdul Rahman* [2007] 2 CLJ 33 CA (*refd*)*PP v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233 FC (*refd*)

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PP v. Mohamed Ali [1962] 1 LNS 129 HC (*refd*)

Prakash Chand v. State AIR 1979 SC 400 (*refd*)

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R v. Nugent [1977] 3 All ER 662 (*refd*)

Seneviratne v. R [1936] 3 All ER 36 (*refd*)

Tan Foo Su v. PP [1967] 1 LNS 179 HC (*refd*)

Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC (*refd*)

Legislation referred to:

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Criminal Procedure Code, ss. 158, 159, 162, 182A, 399

Evidence Act 1950, ss. 8, 9, 27, 114(g)

Kidnapping Act 1961, s. 3

Penal Code, ss. 300(c), 302, 339, 362

For the 1st appellant - Nurrul Nadia; M/s Gooi & Azura

C

For the 2nd appellant - Afifuddin (Siti Maspurah with him); M/s Salehuddin Saidin & Assocs

For the respondent - Najib Zakaria (Wan Shaharuddin with him); DPPs

Reported by Amutha Suppayah

D

JUDGMENT

Balia Yusof Wahi JCA:

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[1] We heard the appeals by both the appellants together and we unanimously allowed their appeals on the charge under s. 3 of the Kidnapping Act 1961 and they were accordingly acquitted and discharged. However, the appellant Sukhvinder Singh's appeal against the conviction and sentence on the charge of murder was dismissed and we accordingly affirmed the conviction and sentence imposed by the learned Judicial Commissioner ("JC").

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[2] We now give our reasons.

[3] The appellant Sukhvinder Singh Naldip Singh was charged in the Seremban High Court in Seremban Criminal Trial No: 45(B)-11-2009 for the murder of one Gurumardev Singh Gurdev Singh and the charge against him in its original language reads as follows:

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Bahawa kamu pada 1 Februari 2009 diantara jam 3.30 pagi hingga jam 7.00 pagi di Jalan Batu 14, Jalan Sua Betong, Port Dickson, di dalam Daerah Port Dickson, di Dalam Negeri Sembilan Darul Khusus, telah membunuh dengan menyebabkan kematian Gurumardev Singh a/l Gurdev Singh, dengan itu kamu telah melakukan kesalahan di bawah Seksyen 302 Kanun Keseksaan dan boleh dihukum di bawah seksyen yang sama.

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- A [4] In Seremban Criminal Trial No: 45(C)-19-2009, he was charged together with another person, Rashid b. Abdullah with the offence of kidnapping the said Gurumardev Singh Gurdev Singh. The charge against them in its original language reads as follows:
- B Bahawa kamu bersama-sama pada 25 Januari 2009 jam 5.30 petang di rumah Nombor 15, Jalan Anggerik Doritis 31/139, Kota Kemuning, Seksyen 31, Shah Alam, di dalam Daerah Petaling di dalam Negeri Selangor Darul Ehsan, dengan niat bersama telah melakukan dengan niat untuk menahan dengan salah Gurumardev Singh a/l Gurdev Singh bagi maksud untuk mendapatkan wang tebusan sebanyak RM100,000.00. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 3 Akta Penculikan 1961 dan boleh dihukum di bawah seksyen yang sama serta dibaca bersama dengan Seksyen 34 Kanun Keseksaan.
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- D [5] The two cases were heard together by the learned JC where the appellant Sukhvinder Singh Naldip Singh in Seremban Criminal Trial No: 45(B)-11-2009 was referred to as the first accused while Rashid b Abdullah in Seremban Criminal Trial No: 45(C)-11-2009 was referred to as the second accused.
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- F [6] At the conclusion of the trial, the first accused was found guilty and convicted on both the charges of kidnapping and murder and was accordingly sentenced to death, while the second accused was found guilty of the offence of kidnapping and was also sentenced with the death penalty.
- G [7] Against the said convictions and sentences both the accused persons have filed separate appeals. The two appeals before us were heard together and we made reference to the first and second accused persons as the first and second appellants respectively.
- [8] It is crucial that the facts of the case be laid down in some detail.
- H [9] The story unfolded when Gurdev Singh (“SP7”) came home and found the fan and the television set in his son’s room were switched on but his son was nowhere to be found. This was on 25 January 2009.
- I [10] The next day, on 26 January 2009, SP7 went over to his son’s hostel to enquire from his roommate the whereabouts of his son. SP7 and his wife, SP1 then decided to lodge a missing person report at the Balai Polis Kota Kemuning.

[11] On 27 January 2009, SP7 received three phone calls from an unknown person but was unable to have any conversation with the caller. SP7 decided to give the telephone number of the caller to the police. A

[12] At about 8pm the same day, SP7 received another call telling him that his son has been kidnapped and a demand for RM100,000 as ransom was made. B

[13] The following day, on 28 January 2009, while at the Balai Polis Seksyen 15 Shah Alam, SP7 received yet another call asking him whether he had raised the RM100,000. SP7 replied that he was unable to raise that amount of money as he was only a taxi driver. The caller then reduced the sum to RM60,000 or RM70,000. SP7 pleaded with the caller saying that he could pay and had only RM3000. The caller retorted saying “your brother is a Datuk, you can raise the money” and hung up. SP7 and the unknown caller spoke in English. C D

[14] Barely 20 minutes later, another call was made to SP7 threatening him in Bahasa Malaysia that “You cakap banyak, you boleh tengok you punya anak punya mayat di Jalan Melaka”. SP7 pleaded with the caller to speak to his son. E

[15] At about 4pm on the same day, SP7 again received another call enquiring whether he had made any arrangement and again SP7 pleaded to speak to his son. F

[16] At about 10.30pm on the same day, SP7 again received a call and this time around he heard a recorded voice of his son saying “papa I am alive, I’m well taken care papa, I want to go back home” and immediately the line went off. G

[17] On 29 January 2009 at about noon, SP7 received a phone call instructing him to board the Express Rakyat train to Johor Bahru on 30 January 2009, a Friday, and to bring along with him RM15,000 as ransom. H

[18] At about 6am on 30 January 2009, SP7 received another call in Bahasa Malaysia threatening him “Ini hari tidak bagi duit kita habiskan you punya anak”. SP7 replied that he will do as told. I

- A [19] At about 1pm on the same day, while at the railway station, the caller again called SP7 asking for his whereabouts and SP7 informed the caller that he was at the railway station. Detective Rajagopal (SP5) was with SP7 at the railway station.
- B [20] Earlier, before going to the railway station, SP7 had gone to the Police Headquarters at Shah Alam to have RM50 notes in the sum of RM15,000 to be photocopied and SP7 counter signed the photocopied copies of the notes. SP7 stated that he had borrowed the RM15,000 from his brother and his brother-in-law.
- C [21] Together with SP5, SP7 boarded the 2pm train to Johor Bahru at the Kuala Lumpur Railway Station and managed to get a seat at the cafeteria in the train. Soon thereafter, SP7 received a call with a totally different voice from the earlier calls telling him to move to his left and thereafter the line went off immediately.
- D [22] As the train left the Seremban railway station, a call came in telling SP7 to “now throw the money”. At that point of time, SP7 saw the first appellant standing on a bridge holding a hand phone and talking. SP7 confirmed that he was talking to the first appellant.
- E SP7 recognised and knew him. SP7 told him that he has thrown the money onto the ground next to the railway track. After that, the phone line went dead. SP7 tried to call back but failed. SP7 got off the train at the Tampin Station.
- F [23] On Sunday 1 February 2009, SP7 was told to come to the police station and from there he was taken to the Port Dickson Hospital mortuary to identify a corpse. He identified it as his son, the deceased. Earlier in the morning of the same day, the police was informed by SP11, an oil palm plantation worker, about the finding of a dead body on a dirt road leading to his oil palm plantation.
- G [24] At about 3.30am, on 2 February 2009, SP8 (DSP Fadil b. Marsus) from Bahagian Siasatan Khas D9, Jabatan Siasatan Jenayah Bukit Aman, led a team of police personnel to the Terminal Bas Makmur, Kuantan and arrested a suspect named Sukhvinder Singh later identified as the first appellant.
- H [25] At the time of his arrest, the first appellant was carrying a black sling bag with a label “elegance”. An assortment of items were recovered from his person and from the sling bag as shown
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in the senarai bongkar, P44. Altogether 34 items were listed in exh. P44 and among them was a black plastic packet containing cash RM4,600 in RM50 notes. A

[26] Simultaneously, at about 4.45am on the same day, SP9 (ASP Abdul Halim b. Haji Ismail) together with a team of police personnel raided a house at the Mentari Court in Petaling Jaya and arrested the second appellant who was found in one of the rooms in the said house. Upon being questioned, the second appellant admitted the room to be his and so were the items found in the room. B C

[27] Upon searching the room, SP9 recovered a black sling bag “Polo” brand containing RM6800 cash in RM100 notes which the second appellant admitted to be his. A pair of dark blue jeans with a “Rages” brand and a sweater hanging behind the door were also seized by SP9. Another bag, blue in colour, found hanging at the back of the door was also seized. Inside the said bag, was a pair of handcuffs with a “Chicago” brand contained in a black holster with a police insignia. Also seized was a pail containing a blue shirt, “Polo” brand and another collared T-shirt with the words “M-16 Orick The Sound” written on it. A car, Perodua Kembara bearing registration No. JHW 5040 was also seized by SP9. D E

[28] SP6, (ASP Mohd Razlan) the investigating officer of the case, had on 5 February 2009 and 23 February 2009 sent various items seized from the first and second appellants together with deceased’s blood samples to the Chemistry Department for analysis and DNA profiling. F

[29] The chemist report (exh. P35) revealed that the clothing worn by the first appellant at the time of his arrest which included an orange T-shirt (exh. P15), a pair of jeans (exh. P17) a pair of socks (exh. P21A&B) and a pair of shoes (exh. P20A&B) had traces of the deceased’s blood on them. G

[30] In the course of his investigation, SP6 was led to a place where the first appellant had pointed to him the place where the first appellant had thrown a parang. The said parang was found under some bushes and was subsequently sent to the Chemistry Department for analysis. The chemist report (exh. P35) revealed the existence of a DNA profile consistent with the deceased’s blood sample on the same. H I

- A [31] An autopsy on the deceased was carried out by one Dr Sharifah Safoorah (“SP2”) and the post mortem report tendered as exh. P8 indicated that the cause of death was multiple slash wounds.
- B [32] Forming part of the prosecution’s case was a CCTV recording (exh. P58). SP12 in his evidence however admitted that he cannot positively identify that the person shown in the CCTV recording was the first appellant and the deceased. The learned JC however has rejected the evidence of the recording in exh. P58.
- C [33] At the end of the prosecution’s case, the learned JC allowed an application made by the learned Deputy Public Prosecutor to amend the charge in the kidnapping case (Seremban Criminal Trial 458-11-2009) by deleting the word ‘abduksi’ and maintain the words “menahan dengan salah”. Having complied with ss. 158, 159 and 162 of the Criminal Procedure Code, the learned JC
- D went on to find that a *prima facie* case had been established against both the first and second appellants on the charge of kidnapping and called upon them to enter their defence. The learned JC further made a finding that a *prima facie* case has also
- E been established against the first appellant on the charge of murder and accordingly called upon him to enter his defence.

The Defence Case

- F [34] In their defence, both the appellants gave evidence on oath. The first appellant denied abducting the deceased or ever restrained the deceased in any way. The kidnapping was staged by the deceased himself and his friends in order to get money from his family. The deceased came to his house and voluntarily
- G followed him bringing with him his own clothings. It was the deceased who requested for his assistance to hire a car from the second appellant for five days. As to the traces of blood found on his clothings and the socks and shoes he was wearing, the first appellant stated that the deceased had fallen outside a restaurant
- H in Yong Peng. The deceased was drunk and his mouth, nose and head were bleeding as a result of the fall.
- I [35] The second appellant was in the car rental business. The first appellant whom he had known earlier told him that he and his cousin wanted to hire a car for five to six days for a drive around Port Dickson, Seremban, and Melaka. The first appellant told him that the deceased had planned the kidnapping to get

money from his rich uncle and family. The second appellant stated that he was merely driving them around to Port Dickson, Seremban and Johor Bahru and he was paid for that. He was with the deceased and the first appellant and had checked into a hotel and had drinks with them. The deceased went about on his own free will. On the death of the deceased, the second appellant stated that he believed the first appellant was involved in the murder because in the early hours of the morning of 1 February 2009, he had stopped his car at an off road track in the Port Dickson area and both the deceased and the first appellant got out and went a distance away. He was sleeping in the car. Later, the first appellant came with his blood stained clothings and was shivering. Upon being asked about the deceased, the first appellant merely replied 'bastard family'. The second appellant further stated in his evidence that subsequently he dropped the first appellant at Brickfields and there, the first appellant warned him "jangan report, otherwise I will implicate you in the murder". In regard to the RM6,600 found on him at the time of his arrest, the second appellant explained that he received it from the deceased as payment for the car rental and petrol for nine days and six days hotel bill and for drinks and cigarettes.

[36] The defence also called two other witnesses in the persons of SD2 and SD4. SD2 was the owner of the restaurant at Yong Peng where the two appellants were seen having drinks with another male on 30 January 2009 and 31 January 2009. The trio according to SD2, looked happy and were drinking beer together.

[37] SD4 was a receptionist at the U Hotel, Skudai, Johor. She handed over to the police the CCTV recording of the reception area of the hotel on 31 January 2009. She testified that the person in the recording looked like they were friends.

[38] At the end of the defence case, the learned JC, found both the first and second appellants had failed to cast a reasonable doubt on the prosecution's case and both the appellants were found guilty and convicted on the charge of kidnapping and sentenced to death. As for the charge of murder against the first appellant, the learned JC also found that he has failed to cast a reasonable doubt on the prosecution's case and he was accordingly found guilty, convicted and sentenced to death.

A The Appeal

[39] At the outset we must express our disapproval on the practice of counsel drawing up lengthy petition of appeals which upon our close scrutiny amounts nothing more than a repetition of the issues to be raised. We note that learned counsel for the first appellant had put up 36 grounds in the petition of appeal while the second appellant came up with 47 grounds. Going by that statistics, one will certainly be excused in wondering whether in this instance, the learned JC has done anything right at all. As will be noted later in this judgment, most of the grounds stated in the petition of appeal are either abandoned or just simply forgotten.

[40] We are constrained to say that counsel appearing before the courts must render every assistance to judges in the business of dispensing justice. In this instance, we wish to remind counsel on the observation made by Lord Templeman in *Ashmore v. Corporation of Lloyd's* [1992] 2 All ER 486. This is what His Lordship had to say at p. 493 on the issue we raised above:

The parties and particularly their legal advisers in any litigation are under a duty to co-operate with the court by chronological, brief and consistent pleadings which define the issues and leave the Judge to draw his own conclusions about the merits when he hears the case. It is the duty of the counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner. In nearly all cases the correct procedure works perfectly well. But there has been a tendency in some cases for legal advisers, pressed by their clients, to make every point conceivable and inconceivable without judgment or discrimination. In *Banque Financiere de la Cite SA v. Westgate Insurance Co Ltd* (1990) 2 All ER 947 at 959, (1991) 2 AC 249 at 280-281 I warned against proceedings in which all or some of the litigants indulge in over-elaborating causing difficulties to judges at all levels in the achievement of a just result.

[41] Lawyers and litigants must take heed these observations.

[42] We will now deal with the merits of the two appeals.

[43] We will deal with the charge of kidnapping first. Cik Nurrul Nadia, learned counsel for the first appellant submitted that the learned JC has erred in holding in the first place that there was a

prima facie case established against the first appellant not only on the charge of kidnapping but also on the murder charge. Likewise, En Afifuddin, learned counsel for the second appellant submitted that the learned JC has erred both in law and in fact in arriving at the conclusion that a *prima facie* case has been established against the second appellant on the charge of kidnapping.

[44] In her oral submission before us Cik Nurrul Nadia however indicated that she would be pursuing the appeal only on three grounds as stated at p. 3 of her written submissions. They are as follows:

1. Sama Ada Hakim Bicara Adalah Salah Kerana Memutuskan Pendakwaan Telah Buktikan Satu Kes *Prima Facie*
 - a. Wujud keraguan dalam kes pendakwaan bahawa simati telah ditahan secara salah pada 25.1.2009 oleh Perayu
 - b. Wujud keraguan bahawa Perayu Pertama yang telah menyebabkan kematian keatas simati dengan menggunakan parang (P41)
2. Sama Ada Hakim Bicara Adalah Salah Kerana Memanggil Pembelaan Perayu.
3. Sama Ada Hakim Bicara Adalah Salah Kerana Meletakkan Beban Kepada Perayu Untuk Membuktikan Pembelaannya Di Tahap Yang Boleh Memuaskan Dan Meyakinkan.

[45] In dealing with the first issue in respect of the kidnapping charge, it was submitted that there was no unlawful confinement of the deceased and the learned JC's finding of unlawful confinement based on the abrasions on both hands of the deceased is not supported by any evidence. Learned counsel for the first appellant submitted this is an erroneous finding of fact by the learned JC.

[46] It was further submitted that such finding of fact by the learned JC is erroneous because the blood sample of the first appellant referred to in the chemist report, exh. P35 was labelled Sukh Bundar Singh. The first appellant's name is Sukhvinder Singh. The person who took the first appellant's blood sample was one Dr Norita Jusnita, who was not called as a witness and the chemist too was never called as a witness. This has created a gap in the prosecution's case. An adverse presumption under

A s. 114(g) of the Evidence Act 1950 ought to have been invoked by the learned JC on the failure of the prosecution to call Dr Norita and the chemist. The evidence on the finding of DNA profiling of the first appellant on the handcuffs is highly suspect.

B [47] At p. 22 of the appeal record jilid 1, the learned JC made a finding in respect of the handcuffs and unlawful confinement. It reads:

Gari yang digunakan untuk menahan simati dijumpai dalam milikan OKT2.

C 54. Dr. Sharifah Safoorah (SP2) yang melakukan bedah siasat ke atas mayat simati mengesahkan terdapat kesan kecederaan abrasi pada kedua-dua pergelangan tangan dan kaki simati yang boleh disebabkan digari. Sepasang gari (Eksibit P27) yang dijumpai dibilik OKT2 pada 2.2.2009 disahkan oleh laporan kimia (Eksibit P35) mempunyai kesan DNA milik OKT1 dan simati. Jesteru, ini menunjukkan bahawa simati ada ditahan dengan salah. Maka adalah menjadi tugas kedua-dua OKT untuk memperjelaskan kepada Mahkamah bagaimana gari tersebut berada dalam milikan OKT2 dan bagaimana gari tersebut juga mempunyai kesan DNA simati dan OKT1.

F [48] In our view there is nothing inherently erroneous about that finding of fact made by the learned JC as stated in the impugned paragraph stated above. The only conclusion that could be drawn from the set of facts disclosed was that the deceased could have been handcuffed or putting it in another manner, the handcuffs could have been used on the deceased. The finding of the handcuff in the possession of the second appellant's room and the presence of the first appellant's DNA on the same begs for more answers from the duo.

G [49] We have perused the appeal record and gave our attention to the evidence of SP6 on this issue of taking the first appellant's blood sample by Dr Norita Jusnita. He gave his evidence during examination-in-chief quite substantially on this issue. He was never seriously challenged during cross-examination. It was never suggested that Dr Norita Jusnita did not take the first appellant's blood sample or that a blood sample of a different person was taken instead. At p. 36 of the appeal record, jilid 2, the witness stated:

I Saya tandakan sampel darah OKT1 (Sukhvinder Singh) sebagai B1. Saya lihat Dr Norita Jusnita mengambil darah tersebut.

Continuing at p. 37, SP6 said:

A

Semasa proses sampel diambil oleh Dr Norita Jusnita, saya berada di sana untuk melihat proses mengambil sampel darah dan untuk melabel dan saya lihat telah tertera nama Sukhvinder Singh yang dilabel sendiri oleh Dr Norita Jusnita di botol tersebut.

B

Sampel-sampel darah itu diserahkan kepada saya sendiri dan saya hantar ke Jabatan Kimia untuk dianalisa.

On a further question by the learned Deputy Public Prosecutor:

S. Awak Nampak Dr Norita Jusnita ambil darah dari Sukhvinder Singh?

C

J. Ya.

[50] During cross-examination at p. 41 of the same appeal record, SP6 maintained his evidence. The blood sample was taken on 20 February 2009 and on 23 February 2009 the sample together with other exhibits in the case were sent by him and handed over to the chemist for analysis.

D

[51] In our view the non-calling of Dr Norita Jusnita does not affect the prosecution's case. So was the chemist. The chemist report was properly admitted by the court and a copy of it had earlier been served on the appellants. Section 399 of the Criminal Procedure Code has been complied with. We are satisfied that the blood sample although labelled as Sukh Bundar Singh was that of the first appellant. The learned JC had accepted the evidence of SP6 on the issue and we have no reason to differ.

E

F

[52] We recognise that the duty of the prosecution is to prove its case against the accused person beyond reasonable doubt. We also recognise that the prosecution has a discretion whom to call and whether or not they should be called. But that discretion must be exercised having regard to the interest of justice and to call witnesses essential to the unfolding of the narrative of the prosecution's case. (*Ti Chuee Hiang v. Public Prosecutor* [1995] 3 CLJ 1; [1995] 2 MLJ 433, *Seneviratne v. R* [1936] 3 All ER 36, *R v. Nugent* [1977] 3 All ER 662 and *Adel Muhammed el Dabbah v. AG of Palestine* [1944] AC 156).

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A [53] On the invocation of s. 114(g) of the Evidence Act 1950, it is trite that only the failure to call material witnesses will attract the application of the said provision. It is not just a failure to call any witness. (*Munusamy Vengadasalam v. Public Prosecutor* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492). The
B drawing of an adverse inference under s. 114(g) is not an inflexible rule, but depends on the circumstances of each particular case. (*Public Prosecutor v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233 (FC)). On the facts and circumstances of this case, we are
C satisfied that the non-calling of the chemist and Dr Norita Justina could not attract the adverse presumption sought by the appellants.

[54] Moving on to the next issue, it was submitted that the evidence from the recording of the CCTV (exh. P58) clearly
D showed that the deceased was never wrongfully detained or confined as suggested by the prosecution. The learned JC has erred in rejecting the evidence in P58 and in doing so has failed to properly consider the evidence of SP12, the investigating officer of the kidnapping charge. It is the defence case that the
E kidnapping was staged by the deceased himself in the hope of getting some money from his rich uncle and family. The CCTV recording in exh. P58 showed that the two appellants and the deceased were seen casually going in and out of the hotel with no indication at all that the deceased was under any kind of
F confinement or restraint. The evidence of SD2 the owner of the restaurant at Yong Peng seeing the trio drinking beer and laughing together is yet another piece of evidence which has not been appreciated by the learned JC. So was the evidence of SD4, the
G receptionist of U Hotel, Skudai, Johor Bahru who produced the CCTV recording. SD4 testified that the third person in the CCTV recording, referring to the deceased, did not appear to be under any threat or was in any way being forced. Taken in its totality, it was submitted by both learned counsel for the first as well as the second appellants that the defence had cast a reasonable
H doubt on the prosecution's case which would entitle them to an acquittal.

[55] In the course of the hearing of the appeal, both counsel of the appellants invited or rather urged us to view the CCTV recording. The learned Deputy Public Prosecutor, En Najib Zakaria
I concurred. The CCTV recording was accepted by the High Court

and tendered as exh. P58. All parties concerned agreed that no prejudice will be occasioned to any parties should this court agree to view the same. A

[56] We acceded to the request and the hearing was adjourned to enable parties to set the forum for the panel to view the CCTV recording in exh. P58. B

[57] Having seen the CCTV recording ourselves, we were inclined to agree with the submissions of both counsel for the first and second appellants that the learned JC has failed to sufficiently consider and appreciate the evidence of SP12 in rejecting the evidence as contained in the said exh. P58. While it may be true that the images may not be that clear, the identification made by SP12 in his evidence from the clothings of the persons in the recordings compared with the items seized in the course of his investigation, could not be a mere coincidence or a mere assumption by SP12. Beside the clothings, other paraphernalia such as the blue sling bag (exh. P51) and the baseball cap lend credence to SP12's evidence. The evidence of SP12 as a police witness is not inherently improbable. Such evidence must in the first instance be accepted. Thomson CJ in *PP v. Mohamed Ali* [1962] 1 LNS 129; [1962] 1 MLJ 257 had this to say about police witnesses: C D E

... When a Police witness says something that is not inherently improbable his evidence must in the first instance be accepted. If he says he saw a cow jumping over the moon his evidence is, of course, not to be accepted, but if he says he saw a cow wandering along one of the main streets of Kuala Lumpur (the sort of thing we all see every day of our lives) there is not the slightest justification for refusing to believe him. Of course if his evidence is contradicted by other evidence or is shaken by cross-examination then it becomes the business of the Magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherent probability the evidence of any witness, whether a Police witness or not, who gives evidence on affirmation, should normally be accepted. F G H

[58] We are of the view that the learned JC has erred in concluding that the court was made to speculate that the images in the CCTV recording were that of the first appellant and the deceased. We are further of the view that after watching the I

A recording, it leaves no doubt in our minds that there were no indication of any restraint or confinement of anybody from the images seen. The trio seen in the recording were moving in and out of the hotel freely and casually.

B [59] On the issue of wrongful restraint being an ingredient of the offence, En Afifuddin, learned counsel for the second appellant submitted that it was lacking. Section 3 of the Kidnapping Act 1961 states:

C Whoever, with intent to hold any person for ransom, abducts or wrongfully confines or wrongfully restrains such person shall be guilty of an offence and shall be punished on conviction with death or imprisonment for life and shall, if he is not sentenced to death, also be liable to whipping.

D “Menahan dengan salah” as specified in the original charge means wrongful restraint. Section 339 of the Penal Code defines wrongful restraint as:

E Whoever voluntarily obstructs any person, so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

[60] That brings us to the charge which says:

F Bahawa kamu bersama-sama pada 25 Januari 2009 jam 5.30 petang di rumah no. 15, Jalan Anggerik Doritis 31/139, Kota Kemuning, Seksyen 31, Shah Alam, di dalam Daerah Petaling di dalam Negeri Selangor Darul Ehsan, dengan niat bersama telah melakukan dengan niat untuk menahan dengan salah Gurumardev Singh Gurdev Singh bagi maksud untuk mendapatkan wang tebusan sebanyak RM100,000. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 3 Akta Colek 1961 dan boleh dihukum di bawah Seksyen yang sama serta dibaca bersama dengan Seksyen 34 Kanun Keseksaan.

H [61] We agree with the submissions of En Afifuddin that the evidence adduced by the prosecution failed to prove there was wrongful restraint on the deceased at the time and place as suggested in the charge. We agree with his submissions that the evidence tendered does not support the charge. On that ground alone, the prosecution’s case against both the appellants ought to fail.

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[62] Abduction as defined under s. 362 of the Penal Code means: **A**

Whoever by force compels or by any deceitful means induces any person to go from one place, is said to abduct that person.

[63] En Afifuddin submitted that since the prosecution chose to drop “abduction” from the charge, the prosecution must have conceded that the deceased had willingly followed or came along with the two appellants. This is consistent with the defence that the kidnapping was staged by the deceased and the appellants had merely assisted him in carrying out his plans. **B**
C

[64] We pause here to say that we are not questioning the wisdom of the prosecution to amend the charge. That is their prerogative. The court will not interfere. But one thing that is crystal clear in this case is that there is no evidence of any inducement by deceitful means or compulsion by force being proffered by the prosecution in the pursuit of its case against the appellants. In that respect, perhaps the prosecution was right in choosing to amend the charge by dropping the word “abduksi” (abduction). **D**
E

[65] We agree with the appellants’ counsel that the charge against their clients is defective and the prosecution has failed to prove the charge against them. The evidence adduced does not accord with the time, place and the date as stated in the charge. **F**

[66] The learned Deputy Public Prosecutor, En Wan Shaharuddin in his submissions in reply was candid enough to admit that the prosecution has failed to prove where the wrongful restraint was made but has chosen to state the house No. 15, Jalan Anggerik Doritis 31/39, Kota Kemuning, Seksyen 31, Shah Alam, in the charge. But the learned Deputy went on to submit that it has not caused any prejudice to the appellants. We do not think that was a valid submission. **G**

[67] Both counsel for the appellants also submitted that the security guard who was the last person to have seen the deceased was a material witness for the prosecution and the failure of the prosecution to call him must attract the adverse presumption under s. 114(g) of the Evidence Act 1950. In the course of his investigation, SP12 testified that he interviewed the security guard and was told that the deceased was seen to have left his house alone. **H**
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A [68] It is trite law that it is the prerogative of the prosecution whether or not they want to call a particular witness. We have already stated in the earlier part of this judgment on this issue and on the issue of invoking the adverse presumption under s. 114(g) of the Evidence Act 1950. We do not wish to repeat ourselves.

B [69] Alternatively, on the side of caution, En Afifuddin also submitted on the sentence imposed on his client, the second appellant, considering the fact that the second appellant was not charged for the murder of the deceased with the first appellant.

C The facts and circumstances of the case according to the learned counsel, do not merit a sentence of death on the second appellant. He urged the court to consider a lesser offence should the court find that a case has been made against the second appellant. There is nothing in the evidence to indicate that the

D second appellant was involved in the murder of the deceased or to have caused any restraint or injury to the deceased.

[70] Having heard the submissions of all parties concerned and the reply by the learned Deputy Public Prosecutor, we are of the unanimous view that in the light of the various infirmities we have

E adumbrated above, a lurking doubt still exist in our minds that the convictions on the appellants may be unsafe. In the upshot, we allow the appeal against the conviction and sentence under s. 3 of the Kidnapping Act 1961 by both the appellants. Both the first and second appellants are hereby acquitted and discharged.

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[71] We shall now give our reasons in dismissing the appeal by the first appellant in respect of the murder charge.

[72] The first appellant's petition of appeal as we have stated

G earlier, cited numerous grounds. However, Cik Nurrul Nadia in her written submissions only raised three issues as indicated at p. 3 of her written submissions which we have reproduced earlier in this judgment. Learned counsel must be deemed to have abandoned all other issues raised in the petition of appeal or that those other

H grounds are covered in the three grounds of her written submissions.

[73] In addition to her submissions in respect of the kidnapping charge, learned counsel submitted that there is no direct evidence to implicate the first appellant on the death of the deceased. The

I act of the first appellant pointing to SP6 where the parang was found is insufficient to implicate him. That piece of evidence by

SP6 is not admissible and the learned JC had erred in admitting the same as being evidence under s. 8 of the Evidence Act 1950. The evidence against the first appellant was purely circumstantial which were not sufficient to establish a *prima facie* case of murder against him. The learned JC had erred in calling for the defence.

[74] We have perused the grounds of judgment of the learned JC and we found that His Lordship had dealt with the issue quite admirably. We are in agreement with His Lordship that death and identity of the deceased has been proven. There was identification of the deceased by SP7, the father, and SP1, the mother, before the investigating officer SP6 and the doctor (SP2) who did the post mortem.

[75] As to the cause of death, the evidence of SP2 which had been elaborately dealt with by the learned JC established the cause of death being due to massive loss of blood due to multiple slash wounds. The post mortem report, exh. P8 listed no less than 31 injuries on the deceased, 23 of which were slash wounds. According to SP2, some of the injuries were defensive wounds on the palms of the deceased. The slash wounds suffered were caused by a sharp weapon and the wounds showed sharp clean cut margins. The fatal injury being a slash wound measuring 21.0 X 5cm and 4.5cm deep. There was a total excision of the lower left earlobe, incision on the left occiput exposing the underlying intact dura, partial incision of the left thyroid lamina and partial incision of the body at C2, C3 and C4. There was also a total transection of the left carotid artery and the left internal jugular vein had collapsed. There were abrasive wounds on the wrist of the deceased. SP2 had further testified that the injuries caused to the deceased would in the ordinary course of nature cause death. We have had a look at the photographs of the injuries sustained by the deceased taken at the scene of the crime and at the hospital (exhs. P6L-M and P5E-O). What a gory sight they were.

[76] In coming to the finding that it was the first appellant who caused the death of the deceased, the learned JC at pp. 26 and 27 of the appeal record, jilid 1 made a finding thus:

Secara ringkas, Mahkamah membuat dapatan fakta bahawa OKT1 juga adalah orang yang menyebabkan kecederaan-kecederaan pada tubuh simati seperti berikut:

- A** (i) Sebahagian wang tebusan RM4,600.00 adalah dalam milikan OKT1;
- (ii) Gari tersebut mempunyai DNA simati dan OKT1;
- (iii) Menurut SP2 kecederaan-kecederaan abrasi pada pergelangan tangan dan kaki simati boleh disebabkan oleh gari;
- B** (iv) Pakaian, stoking dan kasut OKT1 ada darah simati.

- C** Selain daripada keterangan di atas, keterangan kelakuan OKT1 yang telah menunjukkan kedudukan sebilah parang (P41) yang berada di dalam satu belukar yang terdapat kesan darah simati dan menurut SP2 kecederaan-kecederaan pada simati boleh disebabkan oleh objek tajam adalah mencukupi untuk mengait kematian simati dengan perbuatan OKT1, (rujuk kes *Chian Swee Ong v. PP* [2010] 1 MLJ 16). Justeru, Seksyen 8 Akta Keterangan 1950 dan Seksyen 9 Akta yang sama menjadi amat relevan dan OKT1 mempunyai beban untuk memperjelaskan kelakuan beliau itu. (rujuk kes *Amathevelli a/p P Ramasamy v. PP* [2009] 2 MLJ 367).
- D**

- Mahkamah mendapati, secara cumulative keterangan-keterangan yang ada hanya menunjukkan bahawa OKT1 sahaja orang yang telah menyebabkan kecederaan-kecederaan ke atas simati.
- E**

[77] The prosecution, as stated in the opening speech of the learned Deputy Public Prosecutor, relied on s. 300(c) of the Penal Code which states:

- F** 300. Except in the cases hereinafter accepted, culpable homicide is murder:
- (a) ...
- (b) ...
- G** (c) If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
- (d) ...

- H** [78] The learned JC was right in holding that it is incumbent on the prosecution to prove that the first appellant had the necessary intention to cause those injuries. In this case, that intention was inferred.

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[79] Adding on at p. 27 of the same record, the learned JC went to say on the inference of intention of the first appellant in this way: A

Elemen niat tidak boleh dibuktikan melalui keterangan terus tetapi hanya melalui hal keadaan kes tersebut. Mahkamah membuat rumusan berkenaan niat OKT1 semasa melakukan kecederaan-kecederaan tersebut ke atas simati seperti berikut: B

(i) Senjata yang digunakan;

(ii) Tempat kecederaan-kecederaan yang dilakukan; C

(iii) Jenis kecederaan;

(iv) Bagaimana kecederaan-kecederaan tersebut dilakukan; dan

(v) Jumlah kecederaan. D

[80] It is true the evidence against the first appellant is purely circumstantial. The learned JC cited the case of *Chian Swee Ong v. PP* [2010] 3 CLJ 799; [2010] 1 MLJ 16.

[81] The Federal Court in *Chang Kim Siong v. PP* [1967] 1 LNS 18 has stated that: E

The onus on the prosecution where the evidence is of a circumstantial nature is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it, then it is not sufficient. F

And in *Jayaraman & Ors v. PP* [1981] 1 LNS 129; [1982] 2 MLJ 273, Syed Othman FJ (as he then was) has said the following:

I am well aware that the 'irresistible' formula has been used by the courts here in dealing with circumstantial evidence. But I would like to refer here to *Mc Greevy v. Director of Public Prosecutions* where it was argued at page 279, before the House of Lords that in criminal trial in which the prosecution case, or any essential ingredient thereof, depends, as to the commission of the act, entirely on circumstantial evidence, it is the duty of the trial judge, in addition to giving the usual direction that the prosecution must prove the case beyond reasonable doubt, to explain to the jury in terms appropriate to the case being tried that this direction means that they must not convict on circumstantial evidence unless they are satisfied that the facts proved are (a) consistent with the guilt of the accused and (b) exclude every reasonable explanation other than the guilt of the accused. G
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A (See also: *Chan Chwen Kong v. PP* [1962] 1 LNS 22, *Karam Singh v. PP* [1967] 1 LNS 65, *Dato' Mokhtar Hashim & Anor v. Public Prosecutor* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101; [1983] 2 MLJ 232 and *PP v. Hanif Basree Abdul Rahman* [2007] 2 CLJ 33).

B [82] On the mode of evaluating circumstantial evidence, we may seek guidance from the decision of the Indian Supreme Court in *Kishore Chand v. State of Himachal Pradesh* AIR 1990 SC 2140, where K Ramaswamy J stated:

C The entire prosecution case rested on circumstantial evidence ...

D The question, therefore, is whether the prosecution proved guilt of the appellant beyond all reasonable doubt. In a case of circumstantial evidence, all the circumstances from which the conclusion of the guilt is to be drawn should be fully and cogently established. ... The circumstances must be satisfactorily established and the proved circumstances must bring home the offences to the accused beyond all reasonable doubt. ... In other words when there is no direct witness to the commission of murder and the case rests entirely on circumstantial evidences, the circumstances relied on must be fully established. ...

E ... If any of the circumstances proved in a case are consistent with the innocence of the accused or the chain of the continuity of the circumstances is broken, the accused is entitled to the benefit of the doubt. ... There is a long distance between may be true and must be true. The prosecution has to travel all the way to establish fully all the chain of events which should be consistent only with hypothesis of the guilt or the accused ...

F ... In other words, there must be a chain of evidence so far consistent and complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all probability the act must have been done by the accused and the accused alone.

G [83] Earlier, the Indian Supreme Court had in *Hanumant Govind Nargundkar and another Appellant v. State of Madhya Pradesh* AIR 1952 SC 343 stated as follows:

H It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one

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proposed to be proved. In other words, there must be a chain of evidence so far complete as to not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

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[84] Again, in *Gambhir v. State of Maharashtra* AIR 1982 SC 1157, the Supreme Court of India stated the three tests to be adopted in dealing with circumstantial evidence. At p. 1159 of the report, Misra J stated:

B

The law regarding circumstantial evidence is well-settled. When a case rests upon the circumstantial evidence, such evidence must satisfy three tests: (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

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[85] Against that backdrop, and having perused the records of appeal and the judgment of the learned JC, we are of the view that His Lordship had evaluated all the circumstantial evidence in its entirety and had considered the matter on the factual matrix of the case. On the consideration of the totality of the evidence proffered by the prosecution, we agree that it irresistibly points to only one conclusion and that is the first appellant was responsible for the death of the deceased, and him alone.

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[86] There is also another piece of damning evidence against the first appellant and that was his conduct of pointing to SP6 the place where a parang, exh. P41, was recovered from among the bushes. At p. 38 of the appeal record jilid 1 SP6 testified:

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S: Selepas anda diserahkan Sukhvinder oleh ASP Aidil, ada anda jalankan soal siasat ke atas beliau.

J: Ada – pada 3.2.09. Selepas itu saya dipandu oleh Sukhvinder Singh (OKT1) telah pergi ke tempat kejadian di mana mayat ditemui. Saya menemui sebilah parang yang ditunjuk oleh OKT1.

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- A S: Ceritakan spesifik di tempat kejadian.
- J: Sampai di tempat kejadian OKT1 telah tunjuk arah dengan tangan kanan di mana parang dicampak. Semasa itu tangan kiri OKT1 bergari. Tangan kanan tidak bergari. Sebab dia berpasangan dengan Rashid bergari. Kamudian arah parang
- B ditunjuk, saya arah 1 anggota untuk pergi ke arah tersebut dan tidak lama kemudian telah jumpai 1 parang sebagaimana arah yang ditunjuk oleh OKT1. Parang itu dalam 1 semak tidak boleh lihat secara kasar.
- C SP6 also testified.
- Saya tidak boleh temui parang itu tanpa bantuan OKT1.
- Jarak antara mayat dengan parang 7.15 meter.
- D [87] Upon recovery of the said parang, SP6 testified that there were traces of blood on it, and the chemist report (P35) confirmed that the traces of blood had a DNA profile similar to that of the deceased. The prosecution had produced a photograph in exh. P9(5) and (6) showing from where the said parang was recovered. It was hidden among the bushes. Nobody, without any
- E prior knowledge of the parang, could have ever discovered it. Indeed, it points to the knowledge of the first appellant.
- [88] The learned JC has considered this act of the first appellant pointing towards the direction of the parang in the bushes as evidence of conduct under ss. 8 and 9 of the Evidence Act 1950. His Lordship cited the case of *Amathevelli P Ramasamy v. PP* [2009] 3 CLJ 109; [2009] 2 MLJ 367.
- F
- G [89] In *Amathevelli's* case, one of the grounds of appeal relates to the admissibility of statement by the accused while in police custody, the statement leading to the discovery of exhs. P40 and P44A – F, a gold chain and a locket. The Federal Court held that the information under s. 27 given by the accused was inadmissible because the court considered it as an admission by the accused
- H to the offence for which she was being charged. However, the Federal Court further held that the inadmissibility of the information supplied by the accused does not affect the admissibility of her subsequent conduct under s. 8 of the Evidence Act 1950 irrespective of s. 27. Ariffin Zakaria CJ (Malaya) (as he
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then was) delivering judgment of the court referred to what Chinnappa Reddy J said in *Prakash Chand v. State* 1979 AIR 400 at p. 404: A

The evidence of the circumstances, *simpliciter*, that an accused person led a police officer and pointed out the place where stolen articles or weapon which might have been used in the commission of the offence were found hidden, would be admissible as conducts, under s. 8 of the Evidence Act, irrespective of whether any statement by the accused contemporaneously will or antecedent to such conduct falls within the purview of s. 27 of the Evidence Act (*vide Himachal Pradesh Administration v. Om Prakash* 1972 AIR 975). B
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[90] Learned counsel for the first appellant submitted that the conduct of the first appellant pointing to the direction of the parang was not a spontaneous conduct and therefore s. 8 of the Evidence Act 1950 does not apply. In her submission, s. 8 only applies to spontaneous conduct. D

[91] We have considered s. 8 of the Evidence Act 1950. We found no merit in learned counsel's submission. When pressed for authorities to support her contention, she offered none. E

[92] Although learned counsel did not specifically submit on s. 27 of the Evidence Act 1950 both in her oral and written submissions, para. 25 of the first appellant's petition of appeal did raise the issue on the said s. 27. We dismissed the issue on the authority of *Amathevelli P Ramasamy v. PP* (*supra*). F

[93] The third issue stated by the first appellant's learned counsel in her written submissions read:

3. Sama ada hakim bicara adalah salah kerana meletakkan beban kepada perayu untuk membuktikan pembelaannya di tahap yang boleh memuaskan dan menyakinkan. G

[94] The issue is what burden was put on the first appellant. It was unfortunate that there was no further elaboration by the learned counsel either in the said written submission or in her oral submission before us. We do not exactly know what the learned counsel meant by 'di tahap yang boleh memuaskan dan menyakinkan'. "Memuaskan" translated literally means satisfactorily or satisfactory and "menyakinkan" would literally mean convincing or convincingly. Be that as it may, certainly that burden of proof is unknown in our system of criminal justice. H
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- A [95] The only burden cast on the first appellant is to raise a reasonable doubt on the prosecution's case to earn his acquittal. There is no duty on him to call any evidence. He is at liberty to offer evidence or not as he thinks fit and nothing unfavourable against him may be drawn because he adopts one course rather than the other. (Goh Ah Yew v. PP [1948] 1 LNS 13; [1949] 1 MLJ 150, Abu Bakar v. Regina [1963] 1 LNS 4; [1963] 1 MLJ 288, and Tan Foo Su v. PP [1967] 1 LNS 179; [1967] 2 MLJ 19). Our perusal of the learned JC's grounds of judgment showed that His Lordship had applied the right burden and had considered every aspect of the first appellant's defence on the murder charge beginning from p. 41 of the appeal record, jilid 1 right up to p. 44 of the same, before concluding by saying the following:
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- D Di akhir kes pembelaan, pihak pembelaan telah gagal membangkitkan suatu keraguan yang munasabah berdasarkan prinsip yang telah diterangkan oleh Gopal Sri Ram JCA (sebagaimana dia ketika itu) dalam kes *Sabarudin bin Non & Ors v. PP* [2005] 4 MLJ 37 dimuka surat 53 held 34:
- E (34) As what is meant by "reasonable doubt" we would refer to Underhill's treatise on *The Law of Criminal Evidence* (5th Ed. Vol 1, at page 34) where the learned author stated as follows:
- F The doubt to be reasonable must be such a one as an honest, sensible and fair-minded man might, with reason, entertain consistent with a conscientious desire to ascertain the truth. An honestly entertained doubt of guilt is a reasonable doubt. A vague conjecture of the accused is not a reasonable doubt. A reasonable doubt is one which arises from a consideration of all the evidence in a fair and reasonable way. There must be a candid consideration of all the evidence and if, after this candid consideration, is had by the jurors, there remains in their minds a conviction of the guilt of the accused, then there is no room for a reasonable doubt.
- G
- H Oleh itu di akhir kes pembelaan Mahkamah membuat penemuan spesifik bahawa pihak pendakwaan telah berjaya membuktikan kesnya tanpa keraguan yang munasabah terhadap OKT1 dan selaras dengan Seksyen 182A(1) KPJ, Mahkamah mendapati OKT1 bersalah dan disabitkan dengan kesalahan tersebut.
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[96] It is the duty of the trial judge to consider the case in its entirety. At the end of the defence case the judge is duty bound to re-assess and re-evaluate the totality of the prosecution's case in the light of the defence put forth by the appellant and decide whether the prosecution has proved its case beyond reasonable doubt in accordance with s. 182A of the Criminal Procedure Code. Failure to do so is a misdirection and will be subject to correction by the appellate court. We note that the learned JC had not failed to undertake this exercise.

[97] Having given our utmost consideration over the matter, we are unanimously in agreement that the conviction of the first appellant is safe and we found no appealable error in the learned JC's finding of guilt and convicting the first appellant on the murder charge. Accordingly, the first appellant's appeal against the conviction and sentence on the charge of murder under s. 302 of the Penal Code is dismissed and the conviction and sentence by the High Court is affirmed.

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